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STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF CHIROPRACTIC EXAMINERS
OAL DOCKET NO. BDS-10900-95

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF DOUGLAS ZIMMEL, D.C. License No. MC 002704 TO PRACTICE CHIROPRACTIC IN THE STATE OF NEW JERSEY	Administrative Action ORDER GRANTING PARTIAL SUMMARY DECISION

THIS MATTER having been opened to the Office of Administrative Law (hereinafter the "OAL") by the complainant, Peter Verniero, Attorney General of New Jersey (Pauline Foley, Deputy Attorney General, appearing), before The Honorable Edith Klinger, A.L.J., on application for an Order granting partial summary decision of the claims and allegations set forth in Count II of the Amended Complaint and for imposition of sanctions upon respondent. The OAL having read the moving papers, certifications and briefs submitted in support thereof, and for good cause shown,

IT IS on this day of , 1996,

ORDERED, that partial summary judgment be and is hereby granted.

ORDERED, that sanctions, as deemed appropriate by the Board, shall be imposed upon respondent.

EDITH KLINGER, A.L.J.

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
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IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF

DOUGLAS ZIMMEL, D.C.
License No. MC 002704

TO PRACTICE CHIROPRACTIC IN THE STATE OF NEW JERSEY

BRIEF IN SUPPORT OF NOTICE OF MOTION FOR PARTIAL SUMMARY DECISION

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PROCEDURAL HISTORY

On or about July 12, 1995, the Attorney General filed a two count administrative complaint seeking the imposition of disciplinary sanctions against Douglas Zimmel, D.C. (hereinafter "Respondent"). By leave of the OAL, an Amended Complaint was filed with the Board on or about July 26, 1996. In said Amended Complaint, the Attorney General alleges that respondent engaged in gross and repeated acts of negligence, malpractice or incompetence in violation of N.J.S.A. 45:1-21(c) (d) and (e); and aided and abetted the unlicensed practice of physical therapy in violation of N.J.A.C. 13:35-6.14(c), constituting professional misconduct. More particularly, it is alleged that: (1) respondent rendered and billed for excessive and unindicated treatment to patient Brian McLean during the period of October 23, 1989 through June 27, 1990, for injuries resulting from a July 22, 1988 automobile accident; and (2) respondent employed an unlicensed person named Charles Hendricks ("Chuck") during that period and unlawfully permitted Chuck to administer a physical modality (a rehabilitative exercise program) to patient Brian McLean.

The Attorney General now moves for summary decision on Count II of the Amended Complaint and relies upon Dr. Zimmel's affidavit dated August 22, 1990, as well as Dr. Zimmel's sworn testimony before the October 1, 1992 Preliminary Investigative Committee of the State Board of Chiropractic Examiners.

STATEMENT OF FACTS

On or about October 23, 1989, patient Brian McLean was initially seen by respondent Douglas Zimmel, D.C., with complaints of pain in his neck, upper and lower back, and knees (T9) as the result of an automobile accident which occurred on or about July 28, 1988 (T17).[1] At the time of the initial examination, Dr. Zimmel was told by Mr. McLean that he was being treated by an orthopedist, Irving Strauss, M.D., by means of medication and physical therapy for both a prior accident (December 17, 1987), as well as the July 28, 1988 accident (T15).

Based on the symptoms as presented by Mr. McLean, Dr. Zimmel commenced a course of treatment that consisted of chiropractic adjustments in conjunction with massage therapy and a physical rehabilitative program that included flexibility, stretching exercises and muscle strengthening exercises (T11-T12).

On August 22, 1990, respondent was interviewed by an investigator from the Division of Consumer Affairs Enforcement Bureau regarding his treatment of patient Brian McLean. Dr. Zimmel acknowledged that he incorporated massage therapy and exercise therapy into his practice of chiropractic (Zimmel aff'd, p. 1). Dr. Zimmel also admitted that Charles Hendricks was hired to bring his patients through "their prescribed exercise program" (Zimmel aff'd, p. 2). Subsequent to being interviewed by the Enforcement Bureau, Dr. Zimmel appeared with counsel, Robert S. Susser, Esq., on October 1, 1992 before the Preliminary Investigative Committee of the Board and testified under oath regarding treatment of patient Brian McLean. Dr. Zimmel admitted to the Committee

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[1] "T" refers to Transcript of Proceedings before the PIC dated October 1, 1992.

that an unlicensed person named "Chuck"[2] supervised patient Brian McLean's care plan,[3] and was responsible for overseeing that Mr. McLean was

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[2]

MR. LEMBO: Can you describe Chuck as a therapist?

A: Do I describe him as a therapist? I have referred to him on occasion as a therapist.

MR. LEMBO: Is he a therapist?

A: Well, it depends what your interpretation of a therapist is.

MR. LEMBO: A person licensed to provide physical therapy.

A: No, he's not. [T24-8 to 16].

[3]

MR. LEMBO: Who is Chuck?

A: Chuck is the exercise physiologist.

MR. LEMBO: And what did Chuck do with Brian McClean?

A: He had a prescribed care plan that he was supposed to be brought through. When Brian came in, he made sure that, say, when he was on a Cybex (Phn.) back extension machine, that he didn't deviate his position so he wouldn't injure himself. He just supervised the correct posture. And for stretching exercise, he assisted him.

MR. LEMBO: Where was this being performed?

A: In my office.

MR. LEMBO: Were you there at all times?

A: Yes.

MR. LEMBO: With the patient?

A: What do you mean "with the patient"?

MR. LEMBO: With the patient when the exercise was being performed.

A: Meaning, was I standing there?

MR. LEMBO: Yes.

A: No, I wasn't.

MR. LEMBO: Where were you?

(continued...)

correctly performing each exercise so that Mr. McLean would not injure himself.[4] When Dr. Zimmel was asked to produce the prescription outlining Mr. McLean's rehabilitative exercise program, Dr. Zimmel stated that there was no written prescription directing Chuck.[5] In fact, Dr.

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[3](...continued)
A: I was treating other patients. I would intermittently, you know, walk into the rehab area, oversee it, make sure everything was going all right, talk to the patient. And when they were done, they were put into a room and adjusted. [T23-4 to T24-7].

[4]

MR. LEMBO: What were his [Chuck's] responsibilities with regard to Brian McLean?

A: His responsibility was to make sure Mr. McClean, in each one of his exercises, was doing it correctly, and make sure that he didn't injure himself while he was doing it. [T24-17 to 22].

[5]

DR. BENDER: . . . do you have a prescription for those exercises?

A: I have a prescription for the exercises in general, but not on each visit.

DR. BENDER: Okay. Where does the general prescription exist in your file?

A: I think you're interpreting -- as far as I'm concerned, the therapy was done, the service was actually rendered by me. I didn't feel I needed to write a prescription to Chuck because, you know, he wasn't a physical therapist, and I knew what the care plan should entail, and I let him know what I wanted the patient to undergo.

MR. LEMBO: You wrote for yourself, is that correct, a writing somewhere?

A: No, I don't actually sit down and write myself a prescription. Again, the note I have of what my intentions were, again, I'm sorry that it was addressed to AllState at this point, but that's where it exists.

MR. LEMBO: But, again, how does Chuck know what he's supposed to be doing?

A: We sat down and discussed on a biweekly basis what needed to be done.

(continued...)

Zimmel later admitted that Chuck, not respondent, was the person who evaluated Mr. McLean prior to implementing the rehabilitative exercise program to insure that Mr. McLean was physically capable of doing the regime.[6] Dr. Zimmel also admitted that it was Chuck who actually wrote

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[5](...continued)

MR. LEMBO: What needed to be done?

A: Yes. [T32-12 to T33-16].

[6]

MR. LEMBO: So Chuck did this entire initial evaluation?

A: No, this is the re-evaluation.

MR. LEMBO: On 10-31?

A: I'm sorry that's the initial [evaluation].

MR. LEMBO: And he [Chuck] did that?

A: For this paper, yes, on this page, yes, he did.

MR. LEMBO: Were you in attendance for this? When this was done, for the most part, were you in attendance?

A: I'm in the room. Do you mean standing right next to him?

MR. LEMBO: Yes.

A: For the majority of the test, but not the whole thing. [T38-12 to T39-2]

* * *

DR. BENDER: What rehabilitation exam was done other than what Chuck did on 10-31?

A: That's it. [T42-8 to 10].

DR. BENDER: What relevance did Chuck's exam have to the diagnoses that appear on that bill?

A: What relevance? To that exact diagnosis? The reason that we did this type of testing was to insure that patients that were being brought through this program were in decent shape enough to undergo it without any detrimental effects. This examination, as you call it, was done as just a routine follow-through on that, to make sure there were no adverse variables that would contraindicate further rehabilitation. [T42-20 to 43-6]

(continued...)

the care plan, comments and notes regarding patient Brian McLean's rehabilitative exercise program.[7]

Clearly, there is no issue of material fact regarding Dr. Zimmel's admission that it was the unlicensed aide "Chuck" who designed and implemented the rehabilitative exercise program for the patient despite the prohibitions of N.J.A.C. 13:35-6.14(c).

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[6](...continued)

[7] DR. TARANTINO: Who wrote phase one, phase two, phase three, and who wrote the comments?

A: This was all written by Chuck. This was all under my direction. That's part of what our meetings were about on a weekly basis. And Chuck was just asked to make notes on what he saw.

DR. TARANTINO: As to your prescription?

A: Basically, it's our care plan. [emphasis added] [50-7 to 14].

party must prevail as a matter of law." Brill, supra, 142 N.J. 520, 533 (1995). In the performance of this weighing process the court must be guided by the same evidentiary standard of proof that would apply at the trial on the merits when determining whether there exists a genuine issue of material fact. Id. at 533, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-56 (1986).

However, a mere scintilla of evidence will not defeat a motion for summary judgment. If the facts produced by the opponent are insubstantial, summary judgment should be granted. Judson, at 75. When the moving party demonstrates a prima facie right to summary judgment, the opponent is required to show by competent evidence that a genuine issue of material fact exists. Robbins v. Jersey City, 23 N.J. 229, 241 (1957). Mere sworn conclusions of ultimate fact, without material basis or supporting affidavits by persons having actual knowledge are insufficient to withstand summary judgment.

The overall effect of Brill is that the court must now critically evaluate and weigh the evidence before it. It is not, however, the judge's function to determine the truth of the matter but to determine whether there is a genuine issue for trial. The court must continue to grant all favorable inferences to the non-movant. However, the import of the Brill holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Additionally, the court in Brill stated that although a trial court ruling on a summary judgment motion should not shut a deserving litigant from his [or her] trial, it is equally important that the court not allow "harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Relying on Judson, the court stated:

> If these general rules are applied by the courts with discernment and care, the summary judgment procedure, without unjustly depriving a party of a trial, can effectively eliminate from crowded court calendars cases in which a trial would serve no useful purpose and cases in which the threat of trial is used to coerce settlement. (Citation omitted).

In the present matter, the Attorney General has the burden of establishing that there is no disputed issue of fact. *See* Judson, supra, 17 N.J. at 75. Once a prima facie case in favor of summary decision has been shown, the respondent, as opposing party, has the burden of demonstrating by competent evidence that a genuine issue of fact does exist. *See* Robbins, supra, 23 N.J. at 241. Respondent's failure to do so will entitle the Attorney General to the relief sought.

The Attorney General alleges in Count II of the Amended Complaint that respondent, in violation of N.J.A.C. 13:35-6.1(c),[8] delegated the administration of a physical modality in the form of a rehabilitative exercise program to an unlicensed person named Chuck. The charges are supported by sworn admissions by respondent in both his affidavit dated August 22, 1990, and his sworn testimony given to the Preliminary Investigative Committee on October 1, 1992. Such admissions unequivocally demonstrate that Dr. Zimmel permitted his unlicensed

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[8]In 1989, when treatment was initiated, Dr. Zimmel was a licensed chiropractor subject to N.J.A.C. 13:35-6.1(c), which provides in pertinent part that:

> (a) "Physician" or "doctor," for the purpose of this section, shall mean . . . a doctor of chiropractic (D.C.) . . . .
>
> (c) Physical modalities, for the purpose of this section, shall be limited to heat, diathermy, cold, ultrasound, ultraviolet rays, cold quartz rays and electro-magnetic rays. The aide shall not be permitted to do any rehabilitative exercise programs. No other modalities including T.E.N.S. or traction shall be performed by the unlicensed physician's aide. [Emphasis added].

employee Charles Hendricks ("Chuck") to administer the rehabilitative exercise program to respondent's patient Brian McLean. By his own admissions, Dr. Zimmel testified that,

> He [Chuck] was more involved in the setup of this [the regime] than what, you know, I think you're trying to get at. [T49-16 to 18].

Dr. Zimmel's admissions belie any claims which he may now make that issues of material fact need be further litigated on this Count. Rather, the Attorney General is entitled to prevail as a matter of law because Dr. Zimmel's admissions clearly demonstrate that he violated N.J.A.C. 13:35-6.14(c), constituting professional misconduct, which is grounds for disciplinary sanction pursuant to N.J.S.A. 45:1-21(e).

Based on the governing regulation together with the facts of this case, complainant has clearly demonstrated that he is entitled to summary decision as a matter of law as to Count II.

CONCLUSION

For the reasons herein, the complainant respectfully urges that a partial summary decision be entered against respondent on Count II of the Amended Complaint and a recommendation as to penalty be made.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By _____
Pauline Foley
Deputy Attorney General

Date: 9/3/96